



Comptroller General
of the United States
Washington, D.C. 20548

Calhoun
148375

Decision

Matter of: Global Engineering

File: B-250558

Date: January 11, 1993

Donald P. Young, Esq., and David B. Stinson, Esq., Saul, Ewing, Remick & Saul, for the protester.
Timothy A. Chenault, Esq., United States Coast Guard, for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where bidder has submitted only a facsimile copy of a bid bond and power of attorney as of the time of bid opening, the bid bond is of questionable enforceability and the bid is properly rejected as nonresponsive; since responsiveness cannot be established after bid opening, the defect in the bond cannot be cured by the bidder's submission of the original bond subsequent to bid opening.

DECISION

Global Engineering protests the rejection of its low bid under invitation for bids (IFB) No. DTCG82-92-B-3WCA42, issued by the Coast Guard for the removal of gantry tracks and the construction of concrete pavement where those tracks are removed at the Coast Guard base in Mobile, Alabama. The Coast Guard rejected Global's bid as nonresponsive because Global submitted only a facsimile copy of the required bid bond and power of attorney with its bid. Global argues that the rejection of its bid was improper.

We deny the protest.

The solicitation was issued on July 24, 1992; section H.6 of the IFB required bidders to submit, along with their bids, a bid bond in the amount of 20 percent of the bid price. Nine bids were received by the September 10 extended bid opening date. While Global was the apparent low bidder, it submitted with its bid a facsimile copy of its bid bond and a facsimile copy of its power of attorney. Two days after

bid opening, Global submitted the original bid bond and power of attorney. On September 15 the agency advised Global that its bid had been rejected as nonresponsive as a result of Global's failure to submit the original documents prior to bid opening; this protest followed.

The determinative issue concerning the acceptability of a bid bond is whether, in the event of a default by the bidder, the contracting agency could be certain that the surety would be bound, based on the information in the possession of the contracting agency at the time of bid opening. Executone Info. Sys., Inc., B-246155, Oct. 21, 1991, 91-2 CPD ¶ 353; The King Co., Inc., B-228489, Oct. 30, 1987, 87-2 CPD ¶ 423. If the agency cannot determine definitely from the documents submitted with the bid that the surety would be bound, the bid is nonresponsive and must be rejected. Id. In these circumstances, the bond deficiency may not be cured by submitting the original bond documents after bid opening because this would essentially provide the bidder with the option of accepting or rejecting the award by either correcting or not correcting the bond deficiency, which is inconsistent with the sealed bidding system. Bird Constr., B-240002; B-240002.2, Sept. 19, 1990, 90-2 CPD ¶ 234.

Photocopies of bid bonds generally do not satisfy the requirement for a bid guarantee, because there is no way, other than by referring to the originals after bid opening, for the contracting agency to be certain that there had not been alterations to which the surety had not consented, and that the government, therefore, would in fact be secured. The King Co., Inc., supra. Similarly, a facsimile bond, which is an electronically transmitted copy, is subject to the same uncertainty as a photocopy transmitted by mail; since it is not the original, there is no way to be certain that unauthorized alterations have not been made without referring to the original documents after bid opening. Bird Constr., supra.

Global concedes that we have consistently denied protests filed by bidders who submitted facsimile copies of their bid bonds with their bids in lieu of the original documents. See Executone Info. Sys., Inc., supra; JT Roofing, Inc., B-245823, Oct. 8, 1991, 91-2 CPD ¶ 318; Bird Constr., supra; G&A Gen. Contractors, B-236181, Oct. 4, 1989, 89-2 CPD ¶ 308. However, Global asserts that, in this case, its facsimile bond and power of attorney are sufficient to show the intent of its surety to be bound.

Global's power of attorney form¹ contained the statement "Power of Attorney valid only if numbered in red," which appeared below a serial number. Because the form submitted to the contracting officer was a facsimile copy, this serial number appeared in black, not red. This fact would appear to make the power of attorney submitted prior to bid opening invalid on its face. See The King Co., Inc., supra. However, Global argues that other language contained in the power of attorney form obviates this apparent invalidity. Global asserts that the power of attorney expressly provides that facsimile copies of signatures on the power of attorney form are sufficient to bind the surety. Since a facsimile copy would necessarily reproduce the serial number in black, Global asserts that the contracting officer should have concluded that the surety intended to be bound by the power of attorney regardless of the color of the serial number.

The exact language on the power of attorney form indicates that its references to "facsimile" refer not to a potential transmission by facsimile, as the protester argues, but to a signature produced by mechanical means, such as a typewritten, printed, or stamped signature. See, e.g., Federal Acquisition Regulation (FAR) § 14.405(c)(2); Hugo Key & Son, Inc., B-245227, Aug. 22, 1991, 91-2 CPD ¶ 189. The word "facsimile" appears in three places: "I do hereby further certify that the Certification of this Power of Attorney is **signed and sealed by facsimile . . .**," and "the **signature** of the Secretary or any Assistant Secretary of this Corporation, and the seal of the Corporation, **may be affixed or printed by facsimile** to any certificate to a Power of Attorney of this Corporation, and that **such printed facsimile signature** and seal shall be valid and binding" (Emphasis added.) Each of these passages refers to a signature created by facsimile,² not to a signature transmitted by facsimile.³ As a result, there is no ambiguity between these passages and the requirement that, to be valid, the serial number on Global's power of attorney must be in red. Since the power of attorney the protester submitted with its bid was a facsimile copy, and the serial

¹A power of attorney is evidence that the named attorney-in-fact is authorized to sign the bid bond on the surety's behalf, binding the surety to the bond's terms. See Fred Winegar, B-243557, Aug. 1, 1991, 91-2 CPD ¶ 111.

²A facsimile signature is "a signature produced by mechanical means." Webster's Third New International Dictionary 813 (3d ed. 1966).

³A facsimile is "the process of transmitting and reproducing . . . by a system of radio communication." Webster's Third New International Dictionary 813 (3d ed. 1966).

number appeared in black, the facsimile copy of the document is invalid. The attorney-in-fact named in the power of attorney who signed the bid bond, insofar as the contracting officer could determine from the bid, did not have the authority to bind that surety. The King Co., Inc., supra.

In any event, even if the facsimile copy of the power of attorney were valid, that would not make it certain that the surety would be bound to the terms of the facsimile bond. The statements on Global's power of attorney do not mention facsimiles of signatures contained on the bond. Consequently, the possibility exists that the bond could have been altered after it was signed by the surety and before it was transmitted to the agency, and that the surety could thereafter disclaim liability on the bond. Id.⁴

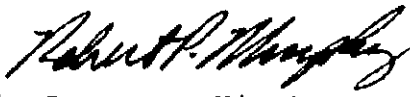
Global contends that the IFB's terms gave the contracting officer the discretion to accept a bid guarantee that is not in the proper form at the time of bid opening. Global bases this argument on its interpretation of FAR § 52.228-1, entitled "Bid Guarantee," which is incorporated by reference into this IFB, and similar language found in section L.1 of the solicitation. Under this clause, "[f]ailure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid." (Emphasis added.) Global asserts that the inclusion of the word "may" makes acceptance or rejection of a bid discretionary.

We disagree. The statement in the solicitation's bid guarantee requirement, and in FAR § 52.228-1(a), that failure to comply "may be cause for rejection" of a bid is just as compelling and material as if more positive language were employed. McLemore Pump, Inc., B-230031, Jan. 27, 1988, 88-1 CPD ¶ 83; Consolidated Installations Corp., B-202630, Apr. 20, 1981, 81-1 CPD ¶ 301. The word "may" is used in the clause because there are limited regulatory exceptions, not present here, to the requirement that a bid accompanied by an inadequate bid guarantee be rejected. See FAR § 28.101-4. The clause does not, however, give the contracting officer blanket discretion to waive inadequate

⁴The protester argues that this basis for our decisions in cases involving facsimile copies of bid bonds is drawn from dicta in The King Co., supra, and that we should not "instinctively" rely on it in other cases of the same nature. Whether or not this basis for our decision was dicta, the rationale is sound. The protester, in fact, does not otherwise challenge this rationale, except to say that since bidders who want to submit forged documents can use a variety of modern reproduction methods, we should not single out facsimile copies of bid bonds as particularly suspect.

bid guarantees. See James C. Bateman Petroleum Servs., Inc., B-228252, Oct. 5, 1987, 87-2 CPD ¶ 337. Thus, the contracting officer here did not have the discretion to waive Global's submission of an inadequate bid guarantee.⁵

The protest is denied.


for James F. Hinchman
General Counsel

⁵As a result, Global's allegation, which is disputed by the agency, that the contracting officer informed it by telephone that the government had sufficient information to bind Global's surety under the bid bond is immaterial. Whether or not this statement was made, the contracting officer did not have the discretion to waive Global's submission of a facsimile bid bond.